No. 88-155

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF TEXAS,

Petitioner,

v.

GREGORY LEE JOHNSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

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BRIEF OF THE LEGAL AFFAIRS COUNCIL AS AMICUS CURIAE

INTERESTS OF THE LEGAL AFFAIRS COUNCIL

The Legal Affairs Council is a non-profit organization dedicated to preserving the inherent and constitutional rights of the people. Of the highest priority to the Legal Affairs Council is the protection of individual

liberty guaranteed by the First Amendment to the Constitution. The Legal Affairs Council, with the written approval of both petitioner and respondent on file in the Clerk's office, submit this amicus curiae brief in support of the petitioner, the state of Texas.

This brief focuses primarily on application of Boos v. Barry, 485 U.S. ____, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) to the facts of this case. Our conclusion is that the holding of this Court in Boos does not control and was misapplied by the Texas Court of Criminal Appeals to the instant facts. The Legal Affairs Council appeared in the Boos case as an amicus, urging that the statute at issue there be struck down as an unconstitutional infringement on free speech. The Texas Court of Criminal Appeals relied heavily on Boos in holding that Texas Penal Code Section 42.09

(Vernon 1974) was unconstitutional in its application to Johnson. Because of its involvement in the Boos case, the Legal Affairs Council wishes to distinguish the Court's holding in Boos from the facts in this case and to argue the reasons why Boos should not have been applied by the Texas Court. The conclusion of the amicus curiae is that section 42.09 did not impose restrictions on Johnson's free speech rights, or in the alternative, that section 42.09 is a content-neutral restriction on conduct mixed with elements of speech, and thus under either approach, Boos is inapplicable. Additionally, we contend that the state of Texas has a substantial interest both in protecting the American flag as a symbol of our country and in preventing breaches of the peace, and these interests are clearly sufficient to satisfy the test in Boos for scrutiny of

laws that infringe on free speech.

SUMMARY OF ARGUMENT

The challenged statute, section 42.09, is not a regulation of speech, but a regulation of conduct. It prohibits desecration of the American flag, and Johnson violated the statute by publicly burning the flag. The statute did not affect Johnson's free speech rights, but regulated his conduct. There is no First Amendment protection for such conduct. However, assuming, for the sake of argument, that this Court will find Johnson's conduct to be a form of protected speech, we submit that Texas has a constitutional right to restrict such conduct in order to protect national emblems and other venerated objects.

The Texas Court of Criminal Appeals analyzed section 42.09 as a content-based restriction on speech and

applied the rule in this Court's opinion in Boos v. Barry as authority for reversing Johnson's conviction for violating section 42.09. We submit that Boos does not control this case because the Texas statute is a content-neutral regulation of conduct. As such, the statute meets the test for constitutionality most recently stated in Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

Should this Court determine that section 42.09 is in fact a content-based restriction on symbolic speech, we submit that the statute meets the test in Boos for such restrictions and that the Texas Court misapplied Boos to the facts before it.

The statute serves a compelling governmental interest and is narrowly tailored to suit that need. The statute

is a constitutional regulation of conduct that leaves open reasonable alternative avenues of expression.

ARGUMENT

I. THE PUBLIC BURNING OF AN AMERICAN FLAG DURING THE COURSE OF A POLITICAL DEMONSTRATION DOES NOT CONSTITUTE FREE SPEECH SUBJECT TO THE PROTECTION OF THE FIRST AMENDMENT.

It is the position of the amicus curiae that the act of flag burning no more rises to the level of protected speech than the act of burning a car to protest air pollution or traffic congestion, the act of burning a courthouse to protest a judicial decision, or the act of burning a ROTC building to protest the Vietnam War. See e.g., Street v. New York, 394 U.S. 576, 616, 89 S.Ct. 1354, 22 L.Ed.2d 572, (1969) (Fortas, J., dissenting); Smith v. Goguen, 415 U.S. 566, 593-94, 94 S.Ct.

1242, 34 L.Ed.2d 605 (1974) (Rehnquist, J., dissenting); Cantwell v. Connecticut, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). "[T]he right of free speech is not absolute at all times and under all circumstances." Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

> This Court has long recognized, for example, that some forms of expression are not entitled to any protection at all under the First Amendment, despite the fact that they could reasonably be thought protected under its literal language. See Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957).

Spence v. Washington, 418 U.S. 405, 417, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974) (Rehnquist, J., dissenting). We rely on the petitioner, however, to make this argument, and turn instead to the alternative question presented in the Petition for Certiorari, discussed below.

II. **ASSUMING THAT DESECRATION OF THE AMERICAN FLAG CARRIES SOME FIRST AMENDMENT PROTECTION, THE STATE OF TEXAS MAY PROPERLY RESTRICT CERTAIN CONDUCT IN ORDER TO PROTECT NATIONAL EMBLEMS AND OTHER VENERATED OBJECTS.**

Under the facts of this case, Johnson's burning of an American flag stolen from a nearby building was not protected speech, symbolic or otherwise. However, assuming, arguendo, that this Court will find Johnson's destruction of the flag to be a form of symbolic speech, Spence v. Washington, 418 U.S. 405, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968); the question then becomes whether such conduct could be restricted by the state of Texas.

For the reasons that follow, we conclude that Texas has a legitimate, substantial interest in outlawing desecration of national emblems and other venerated objects, and that interest

outweighs any First and Fourteenth Amendment protection that may attach to Johnson's conduct.

A. BOOS v. BARRY DOES NOT CONTROL THIS CASE BECAUSE THE TEXAS STATUTE IS A CONTENT-NEUTRAL REGULATION OF CONDUCT.

In Boos v. Barry, 485 U.S. ___, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988), this Court struck down a provision of the District of Columbia Code that made it unlawful to display within 500 feet of a foreign embassy any sign tending to bring a foreign government into public odium or disrepute. The Court found the statute to be a "content-based" restriction on political speech in a public forum, id., 99 L.Ed.2d at 343, and therefore, subjected the statute to "the most exacting scrutiny." Id., 99 L.Ed.2d at 345. The statute was content-based because it completely prohibited one

category of speech within 500 feet of an embassy, while all other catagories of speech, such as favorable speech about a government or speech concerning a labor dispute with a foreign government, were permitted. Id., 99 L.Ed.2d at 343.

As a content-based restriction, the statute was analyzed by this Court in accordance with separate legal theories; the Renton test and the Perry test. Id., 99 L.Ed.2d at 344-45, Renton v. Playtime Theaters, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). The Renton analysis was used to classify the statute as either "content-based" or "content-neutral," but it failed to gain the support of a majority of Justices. Boos, 99 L.Ed.2d at 353 (Brennan, J., concurring in part and concurring in the

judgment).

The Perry test indicates that content-based restrictions on political speech in public forums should be subjected to "the most exacting scrutiny." Boos, 99 L.Ed.2d at 345. "Thus, we have required the State to show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" Id., 99 L.Ed.2d at 345. Perry, 460 U.S. at 45; Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. ____, 107 S.Ct. 2568, 96 L.Ed.2d 500 (1987); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 800, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985); U.S. v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983).

The Perry test, as relied upon in Boos, was the foundation for the Texas

Court of Criminal Appeals' reversal of Johnson's conviction below. Johnson v. State, 755 S.W.2d 92, 96 (1988). But the reasoning of the Texas court is flawed because it reached the Boos/Perry test without first analyzing the Texas desecration statute to determine whether it is a content-based restriction on speech. We conclude, and submit that this Court should conclude, that the statute is clearly content-neutral. Hence, the Perry analysis should not have been applied to the facts in Johnson, and the Texas court's reliance on Boos as constitutional authority for reversing Johnson's conviction was inappropriate. Furthermore, the Texas court ignored a fundamental difference between the "classic political speech" at issue in Boos, 99 L.Ed.2d at 343, and the pointless, violent desecration of a national emblem at issue in Johnson.

This compounds the Texas court's error in relying on Boos.

1. The Texas Statute is Content-Neutral Under Either the Renton Test or the "Bright-Line" Rule.

In Boos, Justice O'Conner wrote that the total prohibition of peaceful display of signs containing words or slogans that might offend foreign dignitaries was a content-based restriction on speech.

> [W]e have held that a regulation that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends . . . to prohibitions of public discussion of an entire topic.' Consolicated Edison Co. v. Public Service Comm'n., 447 U.S. 530, 537, 65 L.Ed.2d, 319, 100 S.Ct. 236 (1986). Here the government has determined that an entire category of speech--signs or displays critical of foreign governments--is not to be permitted.

Boos, 99 L.Ed.2d at 344.

The Court then defined content-

neutral restrictions on speech as those that "are justified without reference to the content of the regulated speech," Id. (emphasis original), Renton, 475 U.S. 41, 48, 96 S.Ct. 1817 (1986), Virginia Pharmacy Board v. Virginia Consumer Council, Inc., 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). One need not look only to the speech being regulated, Justice O'Conner wrote, but also to the justifications for the regulation. "So long as the justifications for the regulation have nothing to do with content . . . we concluded that the regulation was properly analyzed as content-neutral." Boos, 99 L.Ed.2d at 344. But see concurrence of Justice Brennan at 353, in which a call for use of the traditional

"bright-line" test is made.[1]

The Texas statute at issue here meets either the Renton or the "bright-line" test. The statute does not

[1]In his concurrence, Justice Brennan, joined by Justice Marshall, stated his preference for the traditional approach. "[T]he Renton analysis provides none of the clear lines or sanctuaries the First Amendment demands." Boos, 99 L.Ed.2d at 354. Brennan called for use of the "bright-line" rule: "any restriction on speech, the application of which turns on the content of the speech, is a content-based restriction regardless of the motivation that lies behind it." Id.

> The traditional rule thus provides clear guidance. Governments can ascertain the scope of impermissible regulation. Individuals can ascertain the scope of their constitutional protection. The Renton analysis, in contrast, plunges courts into the morass of legislative motive, a notoriously hazardous and indeterminate inquiry, particularly where, as under the Renton approach, the posited purpose flies in the face of plain statutory language.

Id. While the choice of tests is an apparently unresolved doctrinal matter for the Court, we submit that section 42.09 remains clearly content-neutral under the Renton analysis or the traditional "bright-line" rule.

regulate speech at all. It prohibits certain conduct by providing punishment for any person who desecrates a venerated object, defined as a state or national flag, a public monument, a place of burial or worship. Johnson v. State, 706 S.W.2d 120, 122 (Tex.App. Dallas 1986). The statute makes no distinction whatsoever between favorable or unfavorable speech. It merely states that certain objects shall not be desecrated. Furthermore, the justification for the statute clearly and plainly has nothing to do with the content of speech. The obvious justification is to prevent destruction or defacement of objects that the people of Texas have decided should not be destroyed or defaced. While it may be unlikely that the desecration of a venerated object would be performed by those espousing patriotic themes, it is

not impossible. The point is, such conduct is prohibited at all times for all reasons. Accordingly, the statute is "content-neutral."

In Renton, where a zoning ordinance banning adult motion picture theaters within 1,000 feet of residential neighborhoods was in question, the Court first sought to determine whether the ordinance was a content-based or content-neutral regulation of speech before analyzing its constitutionality. Renton, 475 U.S. at 47.

The Court reiterated its long-held view that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment." Id. See Carey v. Brown, 447 U.S. 455, 462-63, and n. 7, 100 S.Ct. 2286, 65 L.Ed. 2d 263 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99, 925 S.Ct.

2286, 33 L.Ed.2d 212 (1972). "At first glance, the Renton ordinance . . . does not appear to fit neatly into either the 'content-based' or the 'content-neutral' category." Renton, 475 U.S. at 47. The Court concluded, however, that the total ban of adult theaters within 1,000 feet of residential neighborhoods "is aimed not at the content of the films shown at 'adult motion picture theaters,' but rather at the secondary effects of such theaters on the surrounding community." Id. (emphasis original). Accordingly, the statute there was classified "content-neutral." Having made that determination, the Renton Court then said that the next appropriate inquiry is [1] whether the ordinance is designed to serve a substantial governmental interest and [2] whether it allows reasonable alternative avenues of communications. Id. at 50 (citing Clark v. Community for

Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 649, 654, 69 L.Ed.2d 298, 101 S.Ct. 2559 (1981)). This two-part inquiry is the appropriate next step of analysis, whether the Court follows the Renton test or Justice Brennan's "bright-line" test.

The two-part inquiry is not unlike the four-part test set forth in U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672, (1968).[2] There, considering whether burning a draft card in violation of law was an unconstitutional

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[2]The Texas Court of Criminal Appeals believed that O'Brien was rejected by this Court. Johnson v. State, 755 S.W.2d at 94 n. 4. The court cited Spence, 418 U.S. at 414 n. 8, as support for its assertion. We submit that the Texas court has misread Spence and we believe O'Brien remains valid authority where conduct mixed with elements of speech is at issue, as opposed to the "symbolic speech" at issue in Spence.

infringement on symbolic free speech, the Court held that when "speech" and "nonspeech" elements are combined in the same course of conduct, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." O'Brien, 391 U.S. at 376 (emphasis added). A regulation of such nonspeech conduct was said to be sufficiently justified:

> [1] if it is within the constitutional power of Government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377. The two-part Renton test for content-neutral restrictions on First Amendment freedoms adds the "reasonable alternative avenues of communications" element to the "substantial governmental

interest" prong. (The Amicus submits that the first element of the O'Brien test--that the regulation be within the power of government to enact--is actually an implied part of the Renton test, or any other test of a statute or regulation. The third element in O'Brien is satisfied by the plain meaning of section 42.09. The fourth element may have been subsumed in the "alternative avenues of communications" prong of Renton.)

We submit that Texas Penal Code Section 42.09 is a content-neutral regulation of symbolic speech, or, alternatively, a regulation of the nonspeech element of conduct that may be combined with speech. The standard set forth in Renton, or the similar standard of O'Brien, or a combination of the two, should be the test applied to the facts in this case. Clearly, Section 42.09

meets either the Renton or the O'Brien test, as is discussed below. The Texas Court of Criminal Appeals wrongly applied a content-based restriction of speech analysis, in reliance on the Perry test used in Boos, and found that the statute was overbroad, and thus unconstitutional as applied to Johnson. To so find was reversible error.

2. The Governmental Interest.

The state of Texas, like every other state in the Union, has a substantial interest in preventing desecration of its state and national flags, monuments and places of worship. The state also has an interest in preserving the peace. Those interests are served by Texas Penal Code Section 42.09.

a. **The National Emblem.**

The interest served by protecting the national emblem is so well-known to this Court that, but for the importance of this case, it would not warrant review. Nonetheless, a few quotations from past opinions of members of this Court serve to summarize the interest asserted by Texas:

> One need not explain fully a phenomenon to recognize its existence and in this case to concede that the flag is an important symbol of nationhood and unity, created by the Nation and endowed with certain attributes. Conceived in this light, I have no doubt about the validity of laws designating and describing the flag and regulating its use, display, and disposition.

Smith v. Goguen, 415 U.S. 566, 587, 39 L.Ed.2d 605, 94 S.Ct. 1242 (1974) (White, J., concurring).

Justice Rehnquist, agreeing with Justice White's sentiments, added:

> The significance of the flag, and the deep emotional feelings it arouses in a large part of our citizenry,

cannot be fully expressed in the two dimensions of a lawyer's brief or of a judicial opinion. But if the Government may create private proprietary interests in written work and in musical and theatrical performances by virtue of copyright laws, I see no reason why it may not, for all of the reasons mentioned, create a similar governmental interest in the flag by prohibiting even those who have purchased the physical object from impairing its physical integrity. For what they have purchased is not merely cloth dyed red, white, and blue, but also the one visible manifestation of two hundred years of nationhood--a history compiled by generations of our forebears and contributed to by streams of immigrants from the four corners of the globe, which has traveled a course since the time of this country's origin that could not have been "foreseen . . . by the most gifted of its begetters."

Id., 415 U.S. at 602-03 (dissenting).

In the same case, Justice White in his concurrence, said:

> There is no doubt in my mind that it is well within the powers of Congress to adopt and prescribe a national flag and to protect the integrity of that flag. Congress may provide for the general welfare, control interstate commerce, provide for the common defense and exercise any powers necessary and proper for those ends. These powers, and the inherent attributes of sovereignty as well,

> surely encompass the designation and protection of a flag. It would be foolishness to suggest that the men who wrote the Constitution thought they were violating it when they specified a flag for the new Nation, Act of Jan. 13, 1794, 1 Stat 341, cl, just as they had for the Union under the Articles of Confederation. 8 Journals of the Continental Congress 464 (June 14, 1777).

Id., 415 U.S. at 586. In this nation created by the power and authority of the sovereign states, we submit that the states retain the power to protect the emblem of the nation they created. See Tenth Amendment, U.S. Constitution.

. . .

> The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it.

Id., 415 U.S. at 587.

. . .

> There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a

> monument, subject to similar protection.

Id.

In Street v. New York, 394 U.S. 576 (1969), Chief Justice Warren stated simply: "I believe that the States and the Federal Government do have the power to protect the flag from acts of desecration and disgrace." 394 U.S. at 605 (dissenting). In the same case, Justice Fortas opined logically that:

> The test that is applicable in every case where conduct is restricted or prohibited is whether the regulation or prohibition is reasonable, due account being taken of the paramountcy of First Amendment values. If, as I submit, it is permissible to prohibit the burning of personal property on the public sidewalk, there is no basis for applying a different rule to flag burning. And the fact that the law is violated for purposes of protest does not immunize the violator. United States v. O'Brien, 391 U.S. 367 (1968); see Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
>
> Beyond this, however, the flag is a special kind of personalty. . . . A person may "own" a flag, but ownership is subject to special burdens and responsibilities. A flag may be

> property, in a sense; but it is property burdened with peculiar obligations and restrictions.

Id. 394 U.S. at 616-17 (dissenting).

The governmental interest in protecting the flag is clear. Indeed, it is the essence of nationhood. It is the same interest that the government has in protecting the Constitution, the Declaration of Independence, the Capitol Building or the Washington Monument. A state government has an identical interest in protecting the flag of the Union to which it belongs, or its state flag, state capitol or a state monument. The American flag has been carried into battle as the symbol of nationhood for all Americans, including those who dissent from national policy or politics. The flag is not a device for symbolic destruction, but a landmark for freedom. It is not a rope for a tug-of-war between opposing political groups. It is what

flies over the tug-of-war, standing guard for free speech and assembly, protecting the right of dissent, immune from tarnish by the words of discourse. "Since the flag symbolizes the entire nation, not just one particular political philosophy, the state may determine that it be kept above the turmoil created by competing ideologies." Deeds v. State, 474 S.W.2d 718 (Tex.Cr.App. 1972), questioned in Johnson v. State, 755 S.W.2d at 94 n. 4.

While this Court's cases speak in terms of "governmental interest" in the regulation of speech, it is not so much a "governmental" interest as it is an interest of the people. Section 42.09 stands as an expression of the will of the people of Texas, not their government. Section 42.09 is a law enacted by the elected representatives of the people and it stands as an expression of their values. They have said that the

flag of this nation is a venerated object. And their law is in no way directed at any citizen's right to speak freely. It merely states that the flag of this country is a symbol for all of the people, and it shall not be desecrated.

How ironic for an institution of government created by the people to deny them the right to hold sacred the symbol of their nationhood. This statute leaves speech free and robust, the clash of ideas flourishing. What it proscribes is the desecration of our nation's symbolic soul by acts of vandalism, regardless of the motives of the vandal.

b. **Preserving the Peace.**

A breach of the peace is not required in every instance in order for a state to legislatively restrict conduct that is likely to result in a breach. See

Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940); Feiner v. New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295 (1951). Although not specifically mentioned in the statute, the state of Texas has clearly asserted an interest in preventing breaches of the peace in its effort to have the statute upheld. Johnson v. State, 706 S.W.2d at 123. It is generally recognized that flag desecration statutes serve the purpose of preventing breaches of the peace and such a purpose is valid and important. Monroe v. State Court of Fulton County, 571 F. Supp. 1023, 1027 (N.D. Ga. 1983), rev. on other grounds 739 F.2d 568 (11th Cir. 1984). "That the state has a legitimate interest in preventing beaches of the peace which can result from reactions to any attempted defilement of the flag has long been recognized." State v. Waterman, 190

N.W.2d 809, 811 (Iowa 1971). And the state's interest "in preserving the peace, is totally unconnected to the suppression of free expression." Sutherland v. DeWulf, 223 F. Supp. 740, 745 (S.D. Ill. 1971).

Should this Court find, as the Texas court did, that the state has no substantial interest in protecting the flag as a national symbol, surely this Court will conclude, as it has in the past, that the state has an interest in restricting and preventing breaches of the peace. Street v. New York, 394 U.S. at 590-92.

Addressing this issue, the Texas court concluded that there was no breach of the peace associated with Johnson's conduct and, therefore, there was no state interest being served by Section 42.09. But the inquiry should have been whether Johnson's desecration of the flag

created a risk of breach of the peace. The term "risk" does not mean that breach must have occurred or even been imminent. State v. Farrell, 223 N.W.2d 270, 272 (Iowa 1974), app. dismissed, 421 U.S. 1007, 95 S.Ct. 2410, 44 L.Ed.2d 675 (1975).

> On the contrary, it denotes nothing more than words or conduct creating exposure to a chance, danger, hazard or peril of breach of peace. See "Risk" Webster's Third International Dictionary, Unabridged at 1961; 77 C.J.S. Risk at 441.

Id., 223 N.W.2d at 272.

Indeed, the desecration and molestation of the flag by burning in a public place "is an act having high likelihood to cause breach of the peace." Sutherland, 323 F. Supp. at 745.

> Taking into account the deeply held and emotional zeal with which so many of our countrymen understandably revere the flag itself, its public desecration by disrespectful burning is an act of incitement as fraught with danger to the public peace as if a person would stand on a street corner shouting derogatory remarks at passing

> pedestrians. See Chaplinisky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766 (1942).

Id. As this Court held long ago,

> it has often occurred that insults to the flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.

Halter v. Nebraska, 205 U.S. 34, 41, 27 S.Ct. 419, 421, 51 L.Ed. 696 (1907).

Actual disturbance should not be the test for a breach of the peace standard, particularly when the act sought to be regulated is conduct and not pure speech. If any act is likely to provoke a breach of the peace, such acts should properly be prohibited for three reasons:

> By prohibiting acts which may produce violence or a breach of the peace, the government deters both of these acts and, proportionally, a smaller number of outbursts that the acts may produce.
>
> Secondly, it is appropriate for the government to set certain standards of conduct in order to guide members of

the community as to those acts that ought to be punished.

> Finally, an act of flag desecration with no resulting violence, is similar to driving while intoxicated with no ensuing accident. Drunk driving is to be discouraged because of the possibility of danger increases when drivers are drunk, much in the same way certain anti-social acts may result in violence.

Rosenblatt; Flag Desecration Statutes: History and Analysis, 1972 Wash. U. L. Q. 173, 216 (1972).

We submit that the act of flag burning in a public setting could and should be classified by this Court as a breach of peace, per se. While we could find no direct authority in support, there are cases where words by themselves were held to be a breach of the peace, Chaplinisky, supra, and other cases in which flag desecration was held to be so likely to result in a breach as to satisfy the state's interest in preventing a breach by regulation. See,

e.g., Sutherland v. DeWuff, 323 F.Supp. at 745; State v. Royal, 113 N.H. 224, 305 A.2d 676, 680 (1973); State v. Mitchell, 32 Ohio App.2d 16, 288 N.E.2d 216, 226 (1972); State v. Waterman, 190 N.W.2d 809, 811-12 (Iowa 1971). Such a classification is a logical and reasonable conclusion drawn from the inherent danger connected with an open fire in a volatile public setting. Such a classification would settle for all time lingering questions that might otherwise be left unanswered by this Court's decision in this case as to whether other state or national laws on this subject satisfy the "state interest" test.

3. A Reasonable Alternative Avenue of Expression.

If this Court accepts the notion that there is a substantial and important

"governmental" interest in preserving the integrity of the flag or in preventing breach of the peace, then this Court should next consider whether Section 42.09 leaves open reasonable alternative avenues of communication. Renton, 475 U.S. at 50. The answer to that query is an overwhelming "Yes." Merely consider the trial court record:

The flag was burned in connection with a protest in Dallas during the 1984 Republican National Convention. The protestors initially stopped at the LTV Tower and traveled to the bottom floor, an area where shops are located. (R. II-71).[3] At this point, the protestors conducted a "die-in," an event wherein the protestors would count down from 10

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[3]References to the record below are as follows: The notation "R.II" through "R.VI" refers to the five volumes of the statement of facts or court reporter's transcriptions from the trial court.

and then fall to the floor moaning and yelling for approximately three to four minutes (R. II-72). Apparently, this demonstration was designed to represent the force and effect of a nuclear explosion. After the "die-in", the marchers walked through Thanksgiving Square and entered the Republic Bank building. (R.II-73) There, the protestors seized and tore up deposit slips, pulled up plants and dumped soil on the ground. (R.II-75)

The march then moved toward the Diamond Shamrock building. The management of this building, evidently knowing in advance of the march, caused the door of this building to be locked. Upon learning this, the protestors beat on the windows, and spray-painted the walls and the windows of the building. (R.II-76). The group then traveled to the Plaza of the Americas complex. Here the

marchers overturned potted plants and spray-painted the floor. (R.II-79). The group then went by sky-walk to the Southland Life building. Various protestors sprayed the floor and walls of the sky-walk. (R.II-81). After another "die-in" at the park, the marchers moved towards the Mercantile National Bank building. (R.II-82). There were three flag poles in front of this building, and one of them bore an American flag. Protestors bent all three poles; one protestor took down the American flag and gave it to Johnson. (R.II-83-84). The protestors next moved to the Dallas Power & Light Company building, where the doors were locked. As they had done before, the protestors spray-painted the windows and beat against them with their fists. (R.II-85). A short time later, the marchers conducted another "die-in" in front of the Southwestern Bell building.

During this "die-in," Officer Stover saw Johnson "shooting the finger" with both hands, saying, "Fuck you, America." (R.II-86-87). Indeed, as the march progressed, Officer Stover heard Johnson shout slogans such as: "Fuck you," "Fuck you, America," and "Fuck the Republicans." (R.II-78).

After a stop at the Federal Reserve building, where the protestors again spray-painted and beat against the windows, the group ended up in front of the Dallas City Hall. (R.II-87-88). There, Officer Stover saw the United States flag being burned while protestors chanted, "America, the red, white and blue, we spit on you." (R.II-91).

Not a single aspect of Johnson's protest that arguably could be classified as speech would be restricted, infringed or punished by Section 42.09, if the

constitutionality of that Section is upheld. In fact, the Texas intermediate appellant court found that the statute "in no way prohibited legitimate protest activities." Johnson v. State, 706 S.W.2d at 122. If the constitutionality of the statute is upheld, the freedom of speech as exercised by Johnson and his group could continue, such as it was, unimpeded by the anti-desecration statute. The protestors could continue to carry their signs and speak their contemptible words. They could express their contempt for everything American, yet 42.09 would not interfere. Whatever point Johnson and his group were trying to make, they could still try to make it. It is difficult to imagine a more vigorous protest, or a more unrestricted forum for the expression of dissent. Johnson would only transgress Section 42.09 if he were to burn the state or

American flag, or desecrate some other venerated object.

To summarize Part A, this Court has long held that even protected speech may be subject to reasonable limitations when important countervailing interests are involved.

> Citizens are not completely free to commit perjury, to libel other citizens, to infringe copyrights, to incite riots, or to interfere unduly with passage through a public thoroughfare. The right of free speech, though precious, remains subject to reasonable accommodation to other valued interests.

Spence, 418 U.S. at 417 (Rehnquist, J., dissenting). The people of Texas have said the flag is just such a valued interest.

B. EVEN IF SECTION 42.09 IS HELD TO BE A CONTENT-BASED RESTRICTION OF SPEECH, THE TEXAS STATUTE SURVIVES THE BOOS/PERRY TEST.

The Texas Court of Criminal Appeals, by finding that Section 42.09

was not narrowly drawn, Johnson v. Texas, 755 S.W.2d at 96, relying on Boos, apparently concluded that Section 42.09 was content-based restriction on speech. However, there was no discussion by the court as to how this determination was reached. The court drew from Boos the test set forth in Perry, supra, for scrutiny of content-based restrictions on speech, to determine if the statute could stand. The court, misapplying the Boos/Perry test, ruled the statute was overly broad. We submit that the statute is sufficiently narrow to survive the Perry test.

In Boos, Part I B, which had the support of a majority of Justices, the Court ruled that a content-based restriction on speech in a public forum must be subjected to exacting scrutiny to stand, in accordance with the Perry test. The state must show [1] a compelling

state interest served by the statute and [2] the statute must be narrowly drawn to achieve that end. Boos, 99 L.Ed.2d at 342, 345. Perry, 460 U.S. at 45.

The display clause in Boos was a restriction on classic political speech, Boos, 99 L.Ed.2d at 343; that is, political slogans displayed peacefully on signs and placards in a public place. Desecration by burning an American flag is not "classic", "speech" or "peaceful", but in any event, the Texas Court of Criminal Appeals found desecration and picketing similar enough to apply the Boos/Perry test to the Johnson facts. Johnson, 755 S.W.2d at 96.

The Texas court found no compelling state interest in preserving and protecting the nation's most visible symbol of its existence. The court summarized:

If the State has a legitimate

> interest in promoting a State approved symbol of unity, that interest is not so compelling as to essentially license the flag's use for only the promotion of governmental status quo.

Johnson, 755 S.W.2d at 97. This reasoning is flawed. The flag can be and is "used" by those who advocate change in the governmental status quo -- it is waived or carried at gatherings representing all points on the philosophical compass.

The court further concluded that because West Virginia State Board of Education v. Barnett, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), O'Brien and Boos, require that there be a legitimate threat that the government stands to lose its interest in the flag as a symbol in order to uphold violations of federal free speech guarantees, the court ruled that it "must hold that the interest of providing a symbol of unity is inadequate to support Section

42.09(a)(3)." Johnson, 755 S.W.2d at 97. But the Texas court misreads Barnett, O'Brien, and Boos, and as discussed in part A 1 above, we submit that the Texas court virtually ignores the people's interest in their nation's flag.

The Texas court also found that since there was no breach of the peace, as viewed by that court, connected with Johnson's conduct, then the state's interest in preventing breaches of the peace was not served by Section 42.09 in this case. Id., 755 S.W.2d at 96. Assuming this Court agrees that Texas has a compelling interest in its venerated objects or in preserving the peace, and assuming, arguendo, that the Court finds Section 42.09 to be a content-based restriction on speech, the question remains whether the statute is unconstitutionally overbroad. Boos, 99 L.Ed.2d at 345. The crucial inquiry,

then, is "whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. City of Rockford, 408 U.S. 104, 115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). The answer is that Section 42.09 does not prohibit what may not be punished for this reason: Flag desecration is not protected speech. Alternatively, flag desecration is conduct connected with elements of speech and may properly be regulated, pursuant to O'Brien. At best, it is symbolic speech and may be properly regulated because the statute is narrowly tailored to serve the state's interest: protecting the national emblem and preserving the peace.

Nonetheless, the Texas court's decision turned on the court's belief that a less restrictive alternative existed to Section 42.09. Johnson, 755

S.W.2d at 96 (relying on Boos, 99 L.Ed.2d at 350). "When a statute which restricts speech is under attack for overbreadth, the existence of another legislative alternative which would further the goal of the challenged statute may be used to prove that the challenged statute is overbroad." Johnson, 755 S.W.2d. at 96. The court cited no authority for that proposition. In its next sentence, though, it did mention Boos, noting that this Court compared the District ordinance in question there with 18 U.S.C. Section 112(b)(2), which served the same interest as the challenged District ordinance. The Texas court then quoted from Boos, thus:

> [W]e conclude that the availability of alternatives such as section 112 amply demonstrates that the display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it

> is not narrowly tailored; a less restrictive alternative is readily available. Thus, even assuming for present purposes that the dignity interest is "compelling," we hold that the display clause of section 22-1115 is inconsistent with the First Amendment.

Johnson, 755 S.W.2d at 96 (quoting Boos, 99 L.Ed.2d at 350).

The Texas court then compared Texas Penal Code Section 42.01, the state "fighting words" statute, with Section 42.09. The court held that Section 42.01 was a less restrictive alternative to 42.09 because it explicitly prohibits utterance likely to incite an immediate breach of the peace, where 42.09 is directed at desecrations that the actor "knows will seriously offend one or more persons likely to observe or discover" the act. That language, the court stated, is so broad that it "may be used to punish protected conduct which has no propensity to result in breaches of the peace." Johnson, 755 S.W.2d at 95. This

statement is perplexing since the Texas court specifically ruled that the statute was unconstitutional as applied to Johnson, id. at 97, even though there was clear evidence of "serious offense" to others (R.II-92; R.III-222). 'And yet the court seems to have made its ruling based on what might happen at some other time in the future, which would be inappropriate.

This Court has long held that as a general rule, "when a criminal charge is based on conduct constitutionally subject to proscription and clearly forbidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior." Coates v. City of Cincinnati, 402 U.S. 611, 618, 91 S.Ct. 1686, 29, L.Ed.2d 214 (1971) (White, J., dissenting). An exception to the general rule is created, however, where the statute at issue "purports to

regulate or proscribe rights of speech or press protected by the First Amendment." Id. at 619; see U.S. v. Robel, 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967); Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629, (1967); Kunz v. New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

> Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute.

Coates, 402 U.S. at 619-20. But the Texas statute does not "purport to regulate or proscribe rights of speech or press." This is the crucial distinction missed by the Texas court. Section 42.09 does not regulate speech. The court should have applied the general rule,

that is, whether the statute was unconstitutionally applied to Johnson, and the court should not have concerned itself with whether the statute "may be used to punish protected conduct . . ." Johnson, 755 S.W.2d at 95 (emphasis added). The issue before the Texas court, under this analysis, was whether the statute was unconstitutional in its application toward Johnson, and clearly it was not.

1. The Texas Statute Was Narrowly Tailored To Satisfy The Asserted Government Interest.

If the Texas Court of Criminal Appeals has correctly concluded that Section 42.09 is a content-based restriction on the speech, then that court wrongly concluded that this Court's holding in Boos requires reversal of Johnson's conviction. The two-part Boos/Perry test has been met under the

facts in this case. The state of Texas has a substantial interest in preserving the flag and preventing breach of the peace, and the statute is narrowly drawn to meet that need.

The Texas court misread Boos to require a test of comparing statutes to prove overbreadth.[4] We submit that the

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[4]If such comparisons are the proper standard for overbreadth analysis, it would be more appropriate to compare section 42.09 to other flag desecration statutes. Section 42.09 is a marked improvement over its predecessor, Article 152, Vernon's Ann. P.C., which provided: "Any person who shall within this State, publicly or privately, mutilate, deface, defile, defy, tramp upon, or cast contempt upon, either by word or act any flag...of the United States..." (emphasis added). See Delorme v. State, 488 S.W.2d 808, 810 (Tex.Cr.App. 1973). The underlined language, of course, was held to be unconstitutional by this Court in Street v. New York, supra. The federal desecration statute, 18 U.S.C. section 700, provides a pertinent part, "Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be..." See Smith v. Goguen, 415 U.S. at 583, n.30 (discussion of section 700's legislative history) and n.31 (discussion of Uniform

(footnote continued)

comparison in Boos of the District and federal statutes at issue is limited to the facts of Boos, where (1) both statutes originally were enacted by Congress, (2) Congress went on to reform

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(continued footnote)
Flag Law of 1917, adopted in some form by many states). In Virginia, where the uniform flag act was amended in 1975, section 18.2-488 provides, "No person shall publicly burn with contempt, mutilate, deface, defile, trample upon . . . any such flag..." In Georgia, the relevant statute provides, "[a] person who deliberately mutilates, defaces, or defiles the flag of the United States...is guilty of a misdemeanor." Georgia Code Ann. Section 26-2801. The common thread of these laws, including Texas', is the subjective element of "contempt," "offense," "knowingly," and are, we submit, distinctions without a substantive difference. Virtually any law, said Justice Rehnquist, "when viewed with sufficient ingenuity, could be thought to interfere with some citizen's preferred means of expression." Spence, 418 U.S. at 417 (dissenting). And yet a "statute is not required to be drawn with the precision of chemical formula or a mathematical equation. Only a reasonable degree of certainty is required in order that fair notice be given to those of ordinary intelligence." State v. Waterman, 190 N.W.2d 809, 813 (Iowa 1971); Hoffman v. U.S., 256 A.2d 567,569 (D.C.App. 1969).

the federal statute while the District delayed, (3) the District's statute was about to be repealed, and (4) the federal statute was about to be extended to the District. Boos, 485 U.S. at 349. Furthermore, the statute in question in Boos restricted "classic political speech." The same cannot be said of either the Texas statute or of Johnson's conduct at the Dallas City Hall. Additionally, this Court, "relying on congressional judgment in this delicate area," Boos, 99 L.Ed.2d at 349-50, concluded that the availability of alternatives such as the federal statute demonstrated that the display clause was not crafted with sufficient precision to withstand First Amendment scrutiny. We submit the District's ordinance was held not to be narrowly tailored not only because a less restrictive alternative was readily available, but also because

of evidence of congressional judgment in an alternative statute that was in the process of being made applicable to the District.

Clearly, that is not the situation with respect to the Texas statutes at issue. The Texas "fighting words" statute, Section 42.01, covers a broad range of disorderly conduct that tends to incite a breach of the peace. Section 42.09, on the other hand, deals only with overt physical acts of desecration of certain objects. Desecration is specifically defined and limited under Section 42.09 to certain enumerated actions. Thus, Section 42.09 is narrowly tailored to fit a certain specific need; in this case, the prevention of flag desecration by public burning. Section 42.01, on the contrary, does not address the same basic interest as Section 42.09

and, thus, cannot be considered a "less restrictive alternative."

2. No Protection for Violent Acts.

An additional argument against the overbreadth holding below is supported by this Court's continuing belief that "where demonstrations turn violent, they lose their protected quality as expression under the First Amendment." Boos, 99 L.Ed.2d at 351; Grayned, 408 U.S. at 116. While mistreatment of the flag in protest or in a demonstration may be protected "symbolic speech," according to Street, Spence and Smith, such mistreatment should lose its protection once the flag is set afire, a per se breach of the peace. (See discussion at pp. 34-35, above). Once the protection of the First Amendment is lost, the scrutiny for overbreadth of the statute is lessened, and it becomes clearer that

statute is appropriately tailored to serve the state's interest.

3. Statutory Construction.

The Texas Court of Criminal Appeals, relying on Boos, ruled that Section 42.09 is so broad that it may be used to punish protected conduct. Johnson, 755 S.W.2d at 96. But, it is the duty of the court, "if it can be done, to construe a statute so that it will remain valid." Delorme v. State, 488 S.W.2d 808, 811 (Tex.Cr.App. 1973); see, e.g. Boos, 99 L.Ed.2d at 350-51; New York v. Ferber, 458 U.S. 747, 769, n. 24, 102 S.Ct. 3348, 73 L.Ed.2d 1113, (1982); U.S. v. Thirty-Seven Photographs, 402 U.S. 363, 368-70, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971). The test for determining whether a statute is unconstitutional on its face because it is so vague and indefinite that it gives

no warning of what acts or conduct transgresses the statute and therefore are violative of due process is whether a person of ordinary intelligence, who would be law-abiding, can determine with reasonable precision what conduct it is his duty to avoid. Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1948); U.S. v. Petrillo, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1946); Cramp v. Board of Public Instruction, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961); Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The Texas Court of Appeals, the intermediate court, applied such an analysis to Section 42.09. It found that:

> Due process does not demand that the words used in a statute be specially defined. Words defined in dictionaries and with meanings so well known as to be understood by a person of ordinary intelligence are not to be considered vague and indefinite. Here, the relevant terms of the offense, "deface," "damage," and "physically mistreat" are all well understood terms. The act of burning the United States flag would clearly constitute desecration under the statute.

Johnson, 706 S.W.2d at 122.[5]

Continuing, the intermediate Texas court found that the statute was not overbroad because, "[a] statute is overbroad when it prohibits both activity which is protected by the constitution and activity which is not. . . . While the flag burning did occur during a

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[5]Johnson contended below that the statute is unconstitutionally vague because "desecration" depends upon the sensibilities of persons likely to observe the action under part (b) of section 42.09. Johnson, 706 S.W.2d at 122. Should this Court find fault with the "seriously offend" language, we submit that no Stromberg problem arises since Johnson was clearly convicted under (a) (3) of the statute, and (a)(3) can stand alone with its plain meaning intact without part (b). Part (b) might be relevant if Johnson had taken some marginal action toward the flag, but a public burning in the context of the instant facts is "desecration" as that word is plainly understood. See Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed 1117 (1931).

political protest rally, the statute in no way prohibited legitimate protest activities." Id.

The Texas Court of Criminal Appeals did not view the statute in the same way. We submit that the intermediate court adopted a reasonable, logical and compelling reading of the statute as applied to the facts before it. Should construction of 42.09 become an issue before this Court, we submit the Court can adopt the intermediate Texas court's interpretation. "[F]ederal courts are without power to adopt a narrowing construction of a state statute unless such a construction is reasonable and readily apparent." Boos, 99 L.Ed.2d at 350-51 (emphasis added). Johnson's conduct was well within the meaning of the words "desecration," "deface," "damage," and "physically mistreat." We urge this Court to so construe Section

42.09, if necessary, and uphold its constitutionality.

CONCLUSION

The relief requested by petitioner, the state of Texas, should be granted. Several errors were committed by the Texas Court of Criminal Appeals, requiring reversal of its decision.

The court below mistakenly viewed Johnson's conduct as "symbolic speech" protected by the First Amendment. It then applied the test set forth in Boos to the statute at issue and found it to be overly broad and, thus, unconstitutional. We submit that Boos is inapplicable to this statute or these facts. The statute at issue does not regulate speech, but conduct, or in the alternative, it is a content-neutral regulation of "symbolic speech" and serves a substantial government interest

while leaving open "reasonable alternative avenues of communication."

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